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IN THE

Supreme Court of the United States

October Terms, 1956

No. 867

UNITED STATES OF AMERICA for the use of EMMETT J. MALLOY,

Petitioner,

vs.

LESLIE S. BOWDEN as Trustee in Bankruptcy for the Estate of FRANK T. HICKEY, INC., Bankrupt; FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation; TWAITS-MORRISON-KNUDSEN-MACCO, a joint venture; and the members of such joint venture, to wit: MORRISON KNUDSEN COMPANY, INC., and MACCO CORPORATION, corporations, and FORD J. TWAITS (individually and as trustee), EDNA M. TWAITS, JANE TWAITS LATAILLADE, CARL H. WITTENBERG and CARL H. WITTENBERG, JR., as partners associated in business under the firm name and style of FORD J. TWAITS CO., a partnership,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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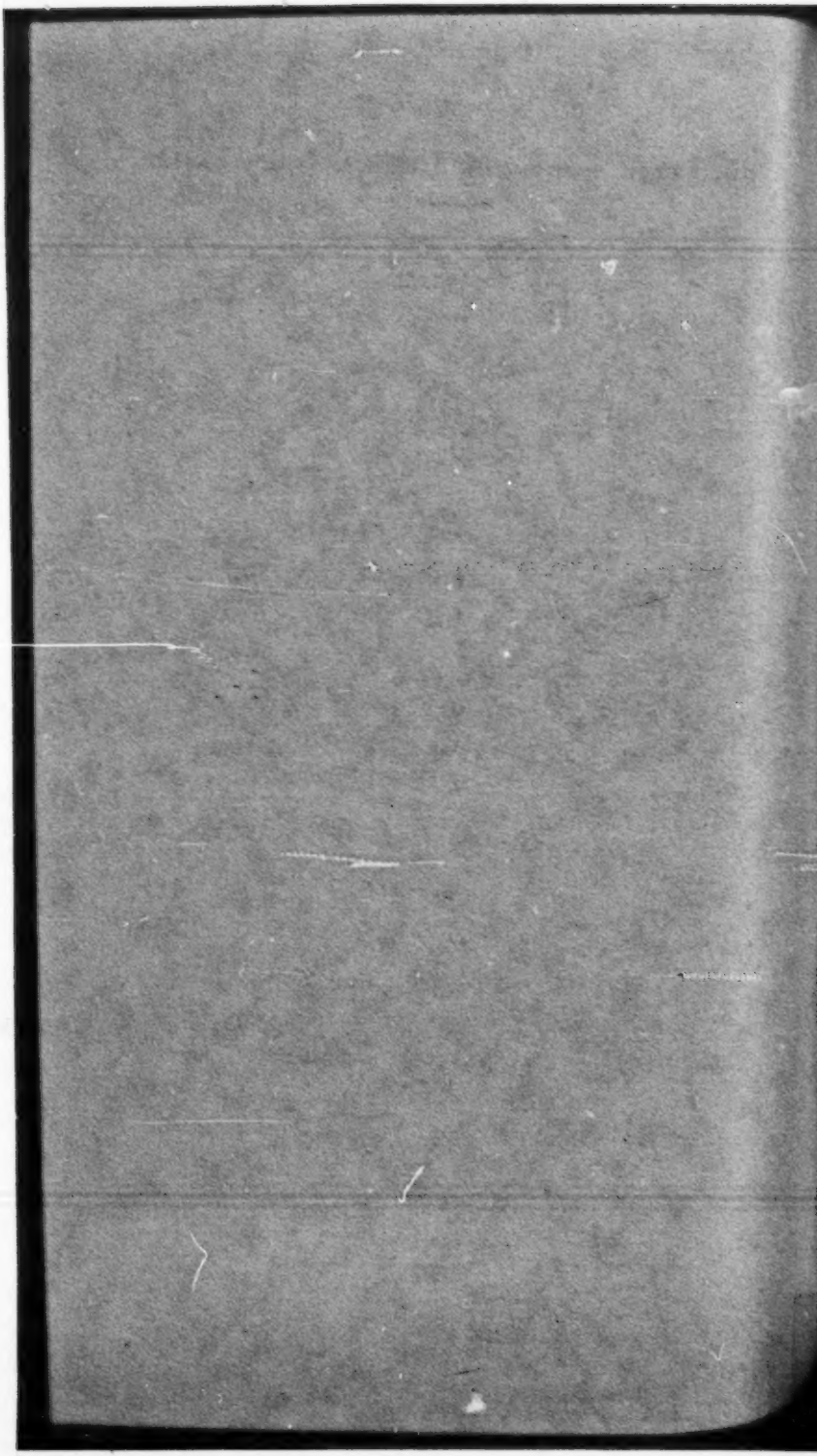

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, the United States of America, for the use of Emmett J. Malloy, respectfully shows:

Petitioner is aggrieved by the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled action, and prays that a writ of certiorari issue to review the same.

Citation to Opinions Below.

The opinion of the Court of Appeals is reported at 239 F. 2d 572, and its opinion and judgment appear in the Record at pages 404-416, and in Appendix B hereto.

The opinion of the District Court is unreported. Its oral decision and its findings of fact and conclusions of law on the two aspects of the case appear in the Record at pages 33-34 (incorporating by reference pages 3-12 20-25, 29-33), and at pages 105-110, 362-371. The order denying preliminary injunction and judgment appear in the Record at pages 35 and 111-112, respectively.

Jurisdiction.

The judgment of the Court of Appeals [R. 416] was entered on December 31, 1956. The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254(1).

Matter Involved.

This case involves the respective liabilities of (1) the contractor on a federal public work, (2) the surety on its payment bond, and (3) the subcontract balance held by the contractor and owed by it to a bankrupt subcontractor for a debt of $5,895.54 owed by the subcontractor to a supplier of labor and material for the job.

Also involved are the respective priorities in such subcontract balance of (a) the supplier, (b) the trustee in bankruptcy of the subcontractor, and (c) a general creditor of the subcontractor.

A timely written notice of the supplier's debt, held to be irregular under the Miller Act, United States Code, Title 40, Section 270(b), was given the contractor by the subcontractor, and was acted upon by the contractor which

made a part payment based thereon direct to the supplier, all within the statutory 90-day period; and no prejudice whatever resulted from want of regular notice. The case involves the sufficiency of such notice, and in the face of, or despite, its irregularity, petitioner's ability to enforce payment of the supplier's debt from the contractor, the surety, or the subcontract balance aforesaid. The Court of Appeals denied petitioner all relief in reversing a District Court judgment on the bond. [R. 111, 416.]

Statement of the Case.

Petitioner brought this action for the use of the supplier, Emmett J. Malloy, in the United States District Court for the Southern District of California, against the contractor, Twaits-Morrison-Knudsen-Macco, a joint venture, composed of Ford J. Twaits Co., a partnership and two corporations, against the members thereof, and against Fidelity & Deposit Co. of Maryland, the surety, for judgment on the bond, and for the declaration and enforcement of an equitable lien on the subcontract balance held by the contractor for the amount of the debt. Petitioner also moved in the District Court for a preliminary injunction impounding the fund to the extent of the debt, upon affidavits showing threatened division of the subcontract balance by the contractor between the trustee in bankruptcy and Ford J. Twaits Co., a general creditor, to the exclusion of suppliers for the job, including Malloy. [R. 3-12, 18-33.]

The trustee in bankruptcy, Leslie S. Bowden, voluntarily intervened as a defendant. [R. 49, 103, 126.]

The District Court gave petitioner judgment against the contractor and surety for the amount of the debt, holding the notice sufficient under the Miller Act; but

denied relief against the fund, holding that no equitable lien existed thereon in favor of the supplier. [R. 33-36, 105-112.] Both plaintiff and defendants appealed. [R. 113-117.]

The Court of Appeals reversed the judgment as to all defendants and ordered the cause remanded with directions for entry of judgment against petitioner on the whole case [R. 414], holding:

(1) That the notice given the contractor was insufficient under the Miller Act, thus discharging the surety [R. 411-413];

(2) By implication, that the contractor was not bound by its contract with the Government to pay the subcontractor's suppliers (as third party beneficiaries), aside from the bond obligation and subject to the notice provision [R. 413];

(3) That no equitable lien exists on the subcontract balance for the benefit of the supplier. [R. 414.]

Each of these three holdings was clearly wrong.

Summary of the Facts.

The contract between the joint venture and the Government provided, among other things, as follows:

> "The contractor shall furnish the materials and perform the work * * *." [R. 240, Art. 1.] "The contractor * * * shall be responsible for all materials delivered (including government-furnished material and equipment delivered to the contractor, unless otherwise specifically provided), and work performed until completion and final acceptance." [R. 242, Art. 4.] "The obligation of the Government to make any payment under this Article 1 shall be subject to deduction in respect of * * * (2) In

> the discretion of the contracting officer shall be subject to deduction in respect of the amount of any claim of any subcontractor or supplier whose subcontract or order is related to the performance of this contract * * *." [R. 243, Art. 25, subp. (e).]

The condition of the payment bond, on which the above surety was obligated to the extent of $732,200, was that:

> "* * * the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract * * *." [R. 376-377.]

In the construction of launching facilities, roads and utilities at the Navy Air Missile Test Center at Point Magu, California, under the above contract, Frank T. Hickey, Inc., excavation subcontractor, using earth moving equipment furnished therefor by Emmett J. Malloy on a rental basis, became insolvent or greatly delinquent in payments to its suppliers, including Malloy, due to unexpected subsidence of earth, all of which was known to the contractor. Upon completing the subcontract on October 31, 1952 (a week after Malloy last furnished equipment), Hickey owed its suppliers for the job more than the subcontract balance due from the contractor.

In view of this, by agreement with Hickey, the contractor undertook the following arrangement:

(1) Upon receipt of a written request from Hickey, listing all its unpaid suppliers for the job and the balance due each therefor (Malloy being listed therein with a $11,791.09 balance), the contractor on December 15, 1952 drew and issued its check to each supplier so listed (payable jointly with Hickey) for the full listed balance due,

if under $1,000.00, and for half the listed balance due, if over $1,000.00. Malloy's check was for $5,895.55 (leaving the aforesaid $5,895.54 unpaid balance) for which he signed a receipt dated December 30, 1952, with an agreement therein "not to lien or authorize stop-payment orders in connection with this project for a period of four months unless notice of completion is filed." [R. 373-375.] These payments left $2,298.95 of the subcontract price unpaid, which the contractor retained pending the outcome of the subsidence claim next mentioned. [R. 408.]

(2) The contractor filed with the Government a claim for extra compensation for Hickey's work, because of the subsidence. This claim was allowed by change order for Hickey's benefit in January, 1954, in the sum of $29,120, whereupon, after deducting certain overhead charges, the contractor credited Hickey's account with $27,260 of the extra compensation, thereby increasing the subcontract balance in the contractor's hands to $29,558.95, as to which it asserted no claim and was a mere stakeholder. [R. 406-408.]

Meanwhile, on July 30, 1953, Hickey was adjudicated a voluntary bankrupt in the United States District Court for Southern California, and Leslie S. Bowden was appointed trustee in bankruptcy. [R. 408.]

On February 23, 1954, for Malloy's use, petitioner brought this action in the same court against the joint venture-contractor, its members and payment surety, for judgment for the supplier's unpaid bill and to have the

sum due declared and enforced as a lien upon the subcontract balance held by the contractor, superior to the claims of all persons. [R. 3-12.]

The extra compensation allowance was paid to the contractor March 25, 1954. [R. 408, 249.] The work as a whole was accepted by the Government in December, 1953, and final settlement was made on May 21, 1954. [R. 268-269.]

In April, 1954, petitioner learned that Ford J. Twaits Co. (a member of the joint venture) claimed to have a general debt against Hickey, on matters not related to the Point Magu job, in the sum of $58,316.01, and was claiming a right to a set-off of one-third of the $29,558.95 subcontract balance against the trustee in bankruptcy by reason thereof, and that the contractor had agreed to divide and pay the entire subcontract balance in its hands, $19,705,97 to the trustee in bankruptcy (for other general creditors) and $9,852.98 to Ford J. Twaits Co. on account of this claim, upon condition that the trustee would *not* contest the partnership's asserted claim and would litigate "in the bankruptcy court to determine which, if any, of the Miller Act claims (against the contractor and its surety) were valid, and upon the final determination of which claims were valid" would pay such claims up to $19,705.97. [R. 389-394.] Petitioner promptly moved the District Court for a preliminary injunction to impound and hold $6,798.42 of the subcontract balance in the contractor's hands pending and subject to the outcome of this action, under the doctrine of equitable lien, and sup-

ported the application with affidavits showing the threatened diversion and depletion of the fund. The District Court issued a temporary restraining order which caught $16,651.40 of the fund (the sum impounded plus the partnership allotment) in the contractor's hands; but the Court, on hearing the motion, refused to issue the injunction and vacated the restraining order upon findings that the facts stated in the affidavits and the complaint were true (for the purpose of the motion), but that on the facts there stated the subcontract balance was not subject to an equitable lien in favor of Malloy. [R. 18-34.]

During the ensuing trial the District Court refused to receive evidence relative to the diversion (although the contractor still had the $16,651.40 in hand) on the ground that he had finally determined the equitable lien claim in denying the injunction. No further findings with respect thereto were made. [R. 129, 134, 105-110.] The appeal resulted in holdings adverse to petitioner on all points.

Questions Presented.

1. Is an unpaid supplier of material and labor to a bankrupt subcontractor on a federal construction project entitled to an equitable lien or charge on the subcontract balance owed to the bankrupt by the contractor superior to the claims thereon of the subcontractor's general creditors and trustee in bankruptcy?

2. Is such supplier entitled to an injunction to prevent, to the extent of his claim, a threatened diversion and dissi-

pation of said subcontract balance by the contractor in payments to a general creditor and trustee in bankruptcy of the bankrupt?

3. Is notice under the Miller Act (40 U. S. C., Sec. 270b) a condition precedent to the contractor's liability on its *contract* obligation to pay all furnishers of material for the job, where it has in possession job proceeds belonging to a subcontractor and could not be prejudiced by paying the bill of a furnisher therefrom?

4. May a District Court lawfully find adequate compliance with the notice requirement of the Miller Act from timely actual notice of the bill of a subcontractor's furnisher, received by the contractor in the form of a letter from the subcontractor requesting payment of one-half thereof by the contractor, and pursuant to which request the contractor pays such half to the furnisher, all within the 90-day statutory period?

5. Is the notice provision of the Miller Act a condition of liability of the contractor and surety, respectively, or a mere device to prevent prejudice to either from want of notice?

Statutes Involved.

The statute involved is the Miller Act, *i.e.*, the Act of August 24, 1935, Chap. 642, 49 Stat. 793, 40 U. S. C., Secs. 270a-270d. A copy of the original Act appears at length in Appendix A hereto.

REASONS FOR ISSUING THE WRIT.

I.

The Decision Herein Conflicts With the Decision of Another Court of Appeals as to the Requirements of Notice.

This conflict appears in footnote 10 of the opinion herein [R. 412], where the Court of Appeals for the Ninth Circuit disapproved of the opinion of the Court of Appeals for the Fifth Circuit in *Houston Fire & Casualty Co. v. United States, for Use of Trane Co.*, 217 F. 2d 727 (C. A. 5, 1954), on the formalities of written notice under Section 2 of the Miller Act, Act of August 24, 1935, Chap. 642, 49 Stat. 793, 40 U. S. C., Secs. 270a-270b.

The rule there stated for the Fifth Circuit is:

> "It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with."

This rule is in harmony with liberal construction enjoined by this Court in *Fleisher Engineering & Construction Co. v. United States for Use of Hallenbeck*, 311 U. S. 15, 61 S. Ct. 81, 85 L. Ed. 12 (1940), affirming 107 F. 2d 925 (C. C. A. 2, 1939), and also with the following: *United States for Use of Birmingham Slag Co. v. Perry*, 115 F. 2d 724 (C. C. A. 5, 1940); *Coffee v. United States for Use of Gordon*, 157 F. 2d 968 (C. C. A. 5, 1946); *United States for Use of Franklin Paint Co., Inc. v. Kagan*, 129 Fed. Supp. 331 (D. C. Mass., 1955).

The contrary view, adopted by the Court in this case [R. 411], is the most rigid application of the rule *strictissimi juris* to the notice provision since this Court disapproved that rule in the above *Fleisher Co.* case (311 U. S. 18) in 1940; and even goes beyond the terms of the statute itself. The Court here states a drastic new rule for the Ninth Circuit, as follows:

> "* * * the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill." [R. 411.]

The words "claim" and "claimed" in the notice provision mean "claimed against the subcontractor," not against the contractor. This distinction is vastly important in routine business relations.

Also, as stated by the District Court herein [R. 366]:

> "The statute doesn't say it has to be in any particular form. It doesn't say it has to be signed by anybody. All it says is that a notice must be given. Notice was given. It was received by the contractor and acted upon by the contractor. I think it is too late for the contractor now to say notice was not sufficient."

In the face of such actual notice, when prejudice did not and could not result from the bare irregularity, to apply the harsh new rule adopted by the Court of Appeals here is to sacrifice justice to form.

The above cases, together with the cases of *United States for Use of Korosh v. Otis Williams Co.*, 30 Fed. Supp. 590 (D. C. Idaho, 1939), and *United States for*

Use of Hargis v. Maryland Casualty Co., 64 Fed. Supp. 522 (D. C. So. Cal., 1946), demonstrate the difficulty of applying "liberally" an absolute requirement for written notice, when actual notice is had and no prejudice results from mere absence of a writing.

II.

The Decision Herein Conflicts With the Applicable Decisions of This Court and Other Courts of Appeals on Equitable Lien.

The only precedents cited in this case against the claim of equitable lien were cases decided in the Ninth Circuit, to wit: *In re Flotation Systems, Inc.*, 65 Fed. Supp. 698 (D. C. So. Cal., 1946), and *Bank of Arizona v. National Surety Corp.*, 237 F. 2d 90 (C. A. 9, 1956). [R. 414.]

The decision is predicated on a view that the only protection a federal supplier has is a suit on the bond.

In all other courts elsewhere, so far as we have been able to ascertain, the right of an unpaid supplier to an equitable lien on federal job proceeds in the hands of a stakeholder, in preference to the claims of general creditors and trustees in bankruptcy of a contractor has never been doubted. In *United States v. Munsey Trust Company*, 332 U. S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947), this Court said:

> "From *Prairie State Bank v. United States*, 164 U. S. 227 to *American Surety Co. v. Sampsell*, 327 U. S. 269, we have recognized the peculiarly equitable claim of those responsible for the physical completion of building contracts to be paid from available moneys ahead of others whose claims come from the advance of money. But in all those cases, the owner was a mere stakeholder and had no rights of its own to assert."

This is the precise situation here, except that here the stakeholder-contractor is obligated by its contracts with the Government to pay third party beneficiaries, and received a waiver of the Government's retention right to so apply the money itself, upon such agreement.

The Court of Claims recognizes and enforces this priority for suppliers upon job funds retained by the Government. *Hadden, Trustee v. United States,* 132 Ct. Cl. 529, 132 Fed. Supp. 202 (1955); *National Surety Corp. v. United States,* 132 Ct. Cl. 724, 133 Fed. Supp. 381 (1955), cert. den. 350 U. S. 902, 100 L. Ed. 793, 76 S. Ct. 181 (1955); *Maryland Casualty Co. v. United States,* 100 Ct. Cl. 513 (1944).

In *American Surety Co. v. Sampsell,* 327 U. S. 269, 66 S. Ct. 571, 90 L. Ed. 663 (1946), this Court expressly held that failure to give statutory notice requisite to liability on a construction bond had no effect on priority in favor of materialmen and laborers in bankruptcy.

The decision here also conflicts with the following decisions of this Court as to the suppliers equitable priority or lien: *Martin v. National Surety Co.,* 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822 (1937); *American Surety Co. v. Westinghouse Electric Mfg. Co.,* 296 U. S. 133, 56 S. Ct. 9, 80 L. Ed. 105 (1935); *Henningsen v. United States Fidelity & Guaranty Co.,* 208 U. S. 404, 28 S. Ct. 389, 52 L. Ed. 547 (1908); *Prairie State Bank v. United States,* 164 U. S. 227, 17 S. Ct. 142, 41 L. Ed. 412 (1896).

The decision here also conflicts with the following decisions of other courts of appeal on the same matter: *United States Fidelity & Guaranty Co. v. United States,* 201 F. 2d 118 (C. A. 10, 1952); *United States Fidelity*

& Guaranty Co. v. Sweeney, 80 F. 2d 235 (C. C. A. 8, 1935); *Riverview State Bank v. Wentz,* 34 F. 2d 419 (C. C. A. 8, 1929); *London & Lancashire Indemnity Co. v. Enders,* 290 Fed. 98 (C. C. A. 8, 1923); *American Surety Co. v. Finletter,* 274 Fed. 152 (C. C. A. 3, 1921); *Belknap Hardware & Mfg. Co. v. Ohio River Contract Co.,* 271 Fed. 144 (C. C. A. 6, 1921); *In re P. McGarry & Son,* 240 Fed. 400 (C. C. A. 7, 1917); *United States ex rel. Johnson v. Morley Construction Co.,* 98 F. 2d 781 (C. C. A. 2, 1938), cert. den. 305 U. S. 651, 59 S. Ct. 244, 83 L. Ed. 421. (The fourth and the last citations in this paragraph involved extra compensation allowances.)

Also, the decision here conflicts with the following cases on equitable lien, as affected by amendments to the bankruptcy act: *In re William P. Bray Co.,* 127 Fed. Supp. 627 (D. C. Conn., 1954), and *Danais v. DeMatteo Construction Co.,* 102 Fed. Supp. 874 (D. C. N. H., 1952).

III.

The Decision Herein on the Question of the Contractor's Liability Is Probably in Conflict With Applicable Decisions of This Court.

The decision in effect holds that the contractors' contract liability to suppliers, and to the Government on their behalf, is limited to that of its surety on the payment bond.

The obligations of contractor on the contract in this case were to furnish all the labor and material, to be responsible therefor, and to have deducted from any pay-

ments the unpaid bills of any suppliers of labor or material. It was obligated as principal on the bond to promptly pay such suppliers. [R. 240-243, 376-377.]

In view of the foregoing, the decision of the Court of Appeals directing that the judgment be entered in the contractor's favor against petitioner and the supplier is apparently in conflict with the decisions of this Court in *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 296 U. S. 133, 56 S. Ct. 9, 80 L. Ed. 105 (1935); *Mankin v. United States for Use of Ludowici-Celadon Co.*, 215 U. S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910); and *United States for Use of Hill v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906).

These cases hold that the language of the contract, construed in the light of the bond, obligates the contractor to pay the bills of suppliers to subcontractors, as third party beneficiaries; and the difference between his obligation and that of the surety is clearly stated therein. The contractor is liable by contract for all the bills; the surety is liable only on the terms of its bond. Either may be sued separately. *Belknap Hardware & Mfg. Co. v. Ohio River Contract Co.*, 271 Fed. 144 (C. C. A. 6, 1921); *Liebman v. United States*, 153 F. 2d 350 (C. C. A. 9, 1946); *Seaboard Surety Co. v. United States for Use of Marshall-Wells Co.*, 84 F. 2d 348 (C. C. A. 9, 1936); *Indemnity Insurance Co. v. Browning-Ferris Machinery Co.*, 227 F. 2d 804 (C. A. 5, 1955).

IV.

The Decision Herein That Lack of Formal Written Notice, Even Without Resulting Prejudice, Bars All Recovery on the Bond, Is Upon an Important Question Which Has Not Been, but Should Be, Settled by This Court.

The notice, though informal, was held sufficient in *Fleisher Engineering & Construction Co. v. United States for Use of Hallenbeck,* 311 U. S. 15, 61 S. Ct. 81, 85 L. Ed. 12 (1940); hence the legal effect of an insufficient notice was not directly involved in that case, nor in any other case yet decided by this Court.

The lower federal courts have been extremely reluctant, as shown above, to bar all recovery to a supplier who, without any resulting prejudice whatever, has merely failed to give formal written notice of his claim, such as that described in Section 2 of the Miller Act. There is very good reason for this:

The only penalty attached to a failure to give the notice of default required in a private bond guaranteeing the collectibility of a debt is that the surety is discharged to the extent of any resulting prejudice. *Restatement of the Law-Security,* Sec. 137, p. 369.

This rule is also applied to government bonds of like nature. *Jack v. Craighead Rice Mill Co.,* 167 F. 2d 96 (C. C. A. 8, 1948), cert. den. 334 U. S. 829, 68 S. Ct. 1340, 92 L. Ed. 175; *United States for Use of J. B. Van Sciver Co. v. United States Fidelity & Guaranty Co.,* 178 Fed. 721 (C. C. Pa., 1910); *Guaranty Co. v. Pressed Brick Co.,* 191 U. S. 416, 48 L. Ed. 242, 24 S. Ct. 142 (1903).

The opening clause of Section 2 of the Miller Act creates an unconditional right of action on the bond in

favor of all suppliers, including the suppliers of subcontractors, as this Court held in the cases cited below. The ensuing notice *proviso* did not, and was not intended to withdraw that right and create still another right of action for the same beneficiaries limited to notice. It was manifestly intended merely to modify the right already conferred, with respect to certain beneficiaries, *i.e.*, subcontractors' suppliers, and not to withdraw the previously conferred right.

So construed, the statute means that such a supplier, who fails to give the statutory notice, will be limited in his recovery by the amount of any resulting prejudice to the contractor or surety. The language in *Mankin v. United States for Use of Ludowici-Celadon Co.*, 215 U. S. 533, 30 S. Ct. 174, 54 L. Ed. 315 (1910), which first suggested the notice provision, indicates that this is the true meaning of the notice; and under the liberal rules of construction applied in *United States for Use of A. Bryant Co. v. New York Steam Fitting Co.*, 235 U. S. 327, 59 L. Ed. 253, 35 S. Ct. 108 (1914), and *United States for the Use of Hill v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 L. Ed. 437 (1906), the unnecessary and confusing language in the *proviso* may and should be disregarded.

> "Statutes are not to be so literally construed as to defeat the purpose of the legislature." (200 U. S. 203.)

The words "shall have a right of action upon said payment bond upon giving written notice" in the *proviso* contain repetitious surplusage, and merely mean "shall give written notice" in the time and manner indicated, with the usual effects for not doing so.

The notice provision, so construed, will give effect to the true intent of Congress and reduce the burden on the lower federal courts. The commend in *Restatement of the Law-Security*, p. 369, under Sec. 137 is:

> "Since the surety who has guaranteed collectibility of a principal's debt is only discharged to the extent of prejudice from failure to receive notice of what the creditor has done to enforce the principal's duty the surety is not discharged if he has actual knowledge or the creditor's action, even if notice has not been received from the creditor. In such a case the prejudice does not result from the failure to receive notice."

IMPORTANCE OF THE QUESTIONS.

Here, for the first time, a Court of Appeals has adopted two new rules adversely affecting suppliers of labor and material for federal public works, *i.e.*, (1) no equitable lien upon job proceeds for such suppliers, and (2) no relief for a subcontractors' supplier against either contractor or surety, regardless of knowledge or prejudice, if service of a formal written claim for payment by the contractor is not made on the latter by the supplier within the statutory 90 days.

This decision deprives petitioner of rights under its contracts with contractors and payment sureties, made for the protection of such suppliers, without statutory cause; and make it impossible for the Government, when a subcontractor is bankrupt and his supplier has not, for any reason at all, served such formal demand, to regain, or to enforce the proper application, of money paid by the Government, in waiver of its retention rights, under bonded contract agreements that the contractor would pay all such suppliers' bills.

Treating Malloy as the real plaintiff and petitioner, the new rules deprive him of legal and equitable relief accorded other federal suppliers in all federal courts for over 60 years (ever since the passage of the materialmen's act of 1894), except in the District Court for the Southern District of California under the no equitable lien doctrine of *In re Flotation Systems, Inc.*, 65 Fed. Supp. 698 (D. C. So. Cal., 1946); and the danger is that such rulings will be followed elsewhere to the prejudice of all suppliers for federal jobs.

Federal contractors generally face the hazard under these new rules of having to pay general creditors of a bankrupt subcontractor (represented by the trustee in bankruptcy) the subcontract balance earned at the time of bankruptcy, and yet pay the subcontractor's suppliers in actions on the bond outside bankruptcy, under the doctrine of *In re Flotation Systems, Inc.*, 65 Fed. Supp. 698, *supra*. (The priority and protection of the equitable lien over the trustee's lien, outside bankruptcy, was adjudicated in *United States Fidelity & Guaranty Co. v. Sweeney*, 80 F. 2d 235 (C. C. A. 8, 1935).)

The only persons to be benefited by the new rules are general creditors of a bankrupt subcontractor, who contribute nothing to the job (represented by the trustee in bankruptcy), and such persons as Ford J. Twaits Co. who happen to occupy the dual position (being a member of the joint venture-contractor) of debtor to the subcontractor for the subcontract balance, and a general creditor of the subcontractor, at the same time.

This case arose out of the complicated plan of defendant Ford J. Twaits Co., evidenced by the novel compromise agreement with the trustee in bankruptcy [R. 392-396], to keep for itself, in preference to Hickey's job suppliers

and other general creditors, money received from the Government under its bonded agreement with the Government [R. 240-242, 378], to pay all suppliers for the job, yet with immunity for itself, its joint venturers, and payment surety under the Miller Act bond. The lower courts were not interested in this aspect of the case, and held that the sole question of decision was whether Malloy had given timely, formal notice of his claim to the contractor, which already knew thereof. [R. 34, 128-129, 134, 252-253, 291, 295-296.] This was erroneous oversimplification, and contrary to equal justice under law.

The judgment should have been against the contractor, including Ford J. Twaits Co., on the contract with an injunction impounding a part of the fund under an equitable lien, which should have been declared and enforced thereon; and also, against the contractor and surety on the bond, in view of their knowledge and the lack of any prejudice from want of formal written notice from Malloy.

Conclusion.

The Petition for Writ of Certiorari should be granted, and appropriate relief decreed by this Court.

Respectfully submitted,

JOHN E. MCCALL,
JAMES C. R. MCCALL,
WILLIAM P. MALLOY,

By JOHN E. MCCALL,
Attorneys for Petitioner.

APPENDIX A.

Miller Act.

Act of August 24, 1935, Ch. 642, 49 Stat. 793
(Title 40 U. S. Code Secs. 270a-270d).

An Act Requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration or repair of said public buildings or public work.

[40 U. S. Code Sec. 270a:]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) before any contract, exceeding $2,000.00 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000.00

the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000.00 and not more than $5,000,000.00, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000.00, the said payment bond shall be in the sum of $2,500,000.00.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impractical for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

[40 U. S. Code Sec. 270b:]

Sec. 2(a). Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and

judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which said person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing tne same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for the district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

[40 U. S. Code Sec. 270c:]

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application

therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

[40 U. S. Code Sec. 270d:]

Sec. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, co-partnerships or corporations.

Sec. 5. This act shall be effective upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any person or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C., Title 40, Sec. 270), is repealed except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

Approved, August 24, 1935.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.
No. 14,658

December 31, 1956

Leslie S. Bowden, Trustee in Bankruptcy for the Estate of Frank T. Hickey, Inc., Bankrupt, Twaits-Morrison-Knudsen-Macco, Morrison Knudsen Company, Inc., Macco Corporation, Ford J. Twaits Co., Ford J. Twaits, individually and as trustee, Edna M. Twaits, Jane Twaits Lataillade, Carl H. Wittenberg and Carl H. Wittenberg, Jr., as partners associated in business under the common name and style of Ford J. Twaits Co. and Fidelity & Deposit Company of Maryland, Appellants, vs. United States of America for the use of Emmett J. Malloy, Appellee.

United States of America for the use of Emmett J. Malloy, Cross-Appellant, Leslie S. Bowden, trustee in bankruptcy, etc., *et al.*, Cross-Appellees.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: FEE and CHAMBERS, Circuit Judges,
WALSH, District Judge.

WALSH, District Judge:

In September, 1951 the United States entered into a contract with appellant Twaits-Morrison-Knudsen-Macco, a joint venture,[1] (hereinafter the "prime contractor"),

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[1]The joint venture is composed of two of the corporate appellants, Morrison-Knudsen Company, Inc. and Macco Corporation, and the appellant partnership, Ford J. Twaits Co.

whereby the latter was to furnish the materials and perform the work for constructing launching facilities, utilities, and roads at the Navy Air Missile Test Center, Point Mugu, California. The initial contract amount, before change orders, was $3,661,000.00 and the prime contractor furnished a payment bond, with appellant Fidelity & Deposit Company of Maryland as one of the sureties thereon, in the sum of $1,464,400.00.[2] Under a subcontract, Frank T. Hickey, Inc., (hereinafter "Hickey"), performed a part of the work required of the prime contractor under its contract with the United States, *i.e.*, grading, excavation, and filling. In doing such work, Hickey used earth moving and excavating equipment which it rented from appellee Malloy. Hickey began work on the Point Mugu job in September, 1951, and used Malloy's equipment from a date soon thereafter and until a very few days before the work under the subcontract was completed on October 31, 1952.

Hickey's arrangement with Malloy provided that payment of rental for the equipment would be made to Malloy thirty days after receipt of monthly invoices therefor. However, such payment program was never actually complied with. By the spring of 1952, Hickey was substantially delinquent in its payments and the situation worsened during the summer months. Throughout the period, Malloy was making efforts to collect the payments which

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[2]The payment bond was furnished pursuant to the provisions of 40 U. S. C. A. §270a (2) and is conditioned that the prime contractor "shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract." The liability of appellant Fidelity & Deposit Company of Maryland as a surety is limited by the terms of the bond to $732,200.00.

were delinquent and, in this connection, Malloy made numerous contacts with representatives of the prime contractor. These representatives assured Malloy that the prime contractor was interested in seeing that Hickey paid its bills incurred in the subcontract work and that they would do what they could to see that Hickey made payment to Malloy. On one occasion, in the summer of 1952, when it was threatened that Malloy's equipment might be removed from the Point Mugu job because of Hickey's delinquency, the prime contractor's agents asked that this action be not taken, stating that Hickey had enough funds then due it under its subcontract to enable it to pay all the bills incurred by it on the Point Mugu job which the prime contractor's agents then knew to be outstanding. The agents stated, also, that they did not propose to pay Hickey any money which they were not sure would be applied upon its indebtedness for work done under the subcontract.

In December, 1952, after the subcontract was completed, the prime contractor owed Hickey approximately $17,000.00[3] in retentions under the subcontract. At a meeting then held between the prime contractor's representatives and Hickey, the latter requested that the prime contractor make the retained amount available to creditors of Hickey whose claims arose out of the Point Mugu work. An understanding was arrived at in the meeting whereby, out of the retained fund, all Hickey's Point Mugu creditors whose claims were less than $1,000.00 would receive payment in full and those whose claims exceeded $1,000.00 would receive 50 per cent of their bills,

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[3]This amount does not take into account the "subsidence" claim which the prime contractor made in Hickey's behalf and which will be referred to hereafter.

checks for the payments to be drawn by the prime contractor payable to the joint order of Hickey and its respective Point Mugu creditors. As a result of the meeting, and on December 12, 1952, Hickey wrote the prime contractor a letter listing its Point Mugu creditors, including Malloy, and authorizing the prime contractor to issue checks payable to the joint payees and for the amounts agreed upon in the meeting.[4]

On December 15, 1952, the prime contractor issued the checks as requested and delivered them to Hickey. On December 29, 1952, Hickey endorsed the prime contractor's check in the amount of $5,895.55 to Malloy and mailed it to him with a letter concerning the balance which Hickey believed would remain due to Malloy after the check was credited and with a letter form receipt which

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[4]The letter reads:

(Letterhead of Frank T. Hickey, Inc.)

"December 12, 1952

"Twaits-Morrison-Knudsen-Macco
449 South Beaudry
Los Angeles 17, California

Attention: Mr. W. E. Coombs

Gentlemen:

"Confirming our conversation, we hereby authorize you to issue checks payable jointly to Frank T. Hickey, Inc. and the creditors listed below. The checks for all accounts under $1,000.00 will be in full and those having a balance larger than $1,000.00 will be in the amounts as discussed. The total so paid is to be charged against funds due Frank T. Hickey, Inc. in connection with work performed on the Launching Facilities Project and Project Building No. 4, Pt. Mugu, California.

"Armco Drainage and Metal Products Co.	$11,406.48
Begleman, J. V.	323.75
Boedecker, F. H.	1.31
Catlin, H.	46.67
Continental Sales and Service Co.	11.00
Crook Co.	5,007.76
Cummings Repair Service	1,797.30

Hickey requested Malloy to sign and return. After modifying the form of the receipt, Malloy executed it and returned it to Hickey.

Hickey's financial condition continued to deteriorate until it filed a voluntary petition in bankruptcy and was adjudicated a bankrupt on July 30, 1953.

In the performance of the subcontract, Hickey had encountered an adverse soil condition at Point Mugu which caused it to do considerable extra work and to incur considerable extra expense. In view of this, the prime contractor on Hickey's behalf made a "subsidence" claim against the United States, which claim was allowed in December, 1953, or in January, 1954, in the amount of $29,120.00. Payment of this sum was made by the United States to the prime contractor on March 25, 1954, and the prime contractor, after deducting certain overhead

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Cummings, S. A.	2,936.42
Duff, Gordon	63.15
Fuller, W. P.	76.02
Galland Oilfield Service	125.00
Gridley Construction Co.	906.49
Holland, W. W.	612.07
Malloy, E. J.	11,791.09
Montalvo Rock Co.	601.49
Nicklas, R. G.	118.13
Rolls, L. M.	38.25
Saticoy Rock Co.	57.76
Terra Co.	1,437.25
Tomb Concrete Co.	22.66
Twaits-Morrison-Knudsen-Macco	247.17
United Concrete Pipe Co.	128.10
Wallace Machinery Co.	46.43
Atlas Powder Co.	142.91

"We wish to take this opportunity to again express our thanks for your consideration and cooperation.

Yours truly,
FRANK T. HICKEY, INC.,
/s/ By FRANK T. HICKEY

cc: A. E. Pay"

charges, credited Hickey's account on its books with $27,260.00. At that time the prime contractor owed Hickey additionally the sum of $2,298.95 for work performed at Point Mugu, so that the total credit balance in Hickey's account on the books of the prime contractor stood at $29,558.95.

To this fund of $29,558.95, claim was made by both appellant Leslie S. Bowden, the trustee in bankruptcy for Hickey's estate, and Ford J. Twaits Co., a partnership, the claim of the latter being that Hickey was indebted to it in an amount probably exceeding $58,000.00 for costs incurred on behalf of Hickey in connection with public works contracts at Saugus, California, and Santa Ana County, California.[5] On February 18, 1954, the trustee filed in the Hickey bankruptcy proceedings a petition for leave to settle his dispute with Ford J. Twaits Co. over the fund in the hands of the prime contractor on a basis whereby the trustee would accept and receive $19,705.97 of the fund in settlement of all its claims against the prime contractor and the balance of the fund would be paid to Ford J. Twaits Co. An order approving the proposed compromise was made by the referee in bankruptcy on March 30, 1954. The order directed that the $19,705.97 compromise sum would be subject in the hands of the trustee to any claims which might have been proved against it had it remained in the possession of the prime contractor and subject, also, to any claims which might be proved against the prime contractor under the Miller Act[6] by suppliers to Hickey of labor and materials on the Point Mugu job.

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[5]None of the indebtedness claimed by Ford J. Twaits Co. grew out of Hickey's work at Point Mugu.

[6]§§270a-270e, Title 40, U. S. C. A.

On February 23, 1954, the present action was instituted by Malloy in the district court against all of the appellants other than Trustee Bowden. The complaint sought recovery on the payment bond under the Miller Act of $6,027.45, with interest, Malloy alleging that he had direct contractual relationship with both Hickey and the prime contractor. The complaint asked, also, that an equitable lien to secure payment of Malloy's claim be impressed upon the proceeds of the "subsidence" claim then in the hands of the prime contractor. Malloy moved in the district court on April 9, 1954, for a preliminary injunction enjoining the prime contractor and its surety, pending final determination of Malloy's action, from paying to the trustee in bankruptcy, or any other person, any funds in their possession belonging to Hickey for work done by it at Point Mugu, unless the parties enjoined should retain $6,789.42 of the funds subject to the order of the district court. Immediately following presentation of Malloy's motion, the district court issued a temporary restraining order, effective pending hearing of the motion for a preliminary injunction, giving to Malloy the relief sought by its motion. In view of the restraining order, the prime contractor paid to Hickey's trustee only $12,916.54 of the settlement sum and retained $6,789.42 subject to the further order of the court; and although the district court upon hearing Malloy's motion denied the preliminary injunction and quashed the restraining order, the prime contractor continued to hold the $6,789.42 at the time of trial. Before trial, Hickey's trustee intervened and filed an answer as a defendant in the action, pursuant to stipulation of all parties.

Upon the trial, Malloy learned for the first time of Hickey's letter of December 12, 1952, to the prime con-

tractor.[7] The district judge found that the letter was written notice to the prime contractor given within ninety days from the date on which Malloy furnished and supplied to Hickey the last of the labor and materials for which Malloy was making claim, and that the letter stated with substantial accuracy the amount claimed by Malloy and named Hickey as the party to whom the labor and material had been supplied. The district court then concluded, as a matter of law, that the letter fulfilled the requirements of 40 U. S. C. A. §270b(a)[8] and that, although Malloy had a direct contractual relationship with Hickey but no contractual relationship, express or implied, with the prime contractor, Malloy was entitled to judgment against the prime contractor, the respective joint

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[7]The letter is reproduced in full in footnote 4.

[8]"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

venturers, and their surety for $5,895.54, plus interest and costs. In the course of the trial, the district judge ruled as a matter of law that Malloy had no equitable lien on the fund in the prime contractor's possession.

Judgment having been entered in the district court in favor of Malloy pursuant to the findings and conclusions of the trial judge, appellants prosecute their appeal on the ground that Malloy did not give a sufficient notice to the prime contractor to enable him to bring suit on the payment bond in view of the provisions of 40 U. S. C. A. §270b(a). The cross-appeal questions the correctness of the amount of the judgment granted below and, in addition, claims error in the district court's denial of the injunction sought by appellee and in its refusal to adjudge and enforce the equitable lien claimed by appellee.

As pointed out above, the district judge concluded that Malloy had a direct contractual relationship with Hickey but no contractual relationship, express or implied, with the prime contractor. In view of this conclusion, it followed that Malloy could have a right of action upon the payment bond only if he had given written notice to the prime contractor as provided in the statute. Thus, the large question presented by the appeal in the case is: Was the letter of December 12, 1952, from Hickey to the prime contractor "notice" under the provisions of 40 U. S. C. A. §270b(a)? We hold that it was not.

We think the teaching of the cases[9] which have dealt

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[9]Fleisher Engineering & Construction Co. v. United States for Use and Benefit of Hallenbeck, 311 U. S. 15, 85 L. Ed. 12, 61 S. Ct. 81 (1940); United States for Use and Benefit of American Radiator and Standard Sanitary Corp. v. Northwestern Engineering Co., 8 Cir., 122 F. 2d 600 (1941); United States for Use of Bruce Co., Inc. v. Fraser Construction Co., D. C., W. D. Arkansas, 87

most soundly with questions regarding the sufficiency of notice when it is required to be given by Section 270b(a) may be fairly summarized as follows: The giving of the written notice specified by the statute is a condition precedent to the right of a supplier to sue on the payment bond; the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill. Here there are plainly lacking some of the requisites of a notice sufficient under the rules just stated. There was, of course, no writing sent or presented by Malloy to the prime contractor. The letter from Hickey was certainly not sent or presented on Malloy's authority because Malloy did not even know of its existence until the trial. Finally, nothing in the letter would inform the prime contractor that Malloy expected it to pay Hickey's bill.

The appellee asserts, correctly enough, that the Miller Act is remedial in nature and entitled to a liberal construction in order to effectuate the legislative intent to protect those whose labor and materials go into public projects. He then argues that since the letter from Hickey gave the prime contractor all the information which it would have obtained if Malloy had given it the written notice provided by the statute, the principle of "liberal construction" requires that we hold the latter notice was unnecessary. But this argument goes too far, too fast. It overlooks entirely the fact that the statute makes the

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F. Supp. 1 (1949); United States for Use of Birmingham Slag Co. v. Perry, 5 Cir., 115 F. 2d 724 (1940); Coffee v. United States for Use and Benefit of Gordon, 5 Cir., 157 F. 2d 968 (1946); United States for Use and Benefit of Franklin Paint Co., Inc. v. Kagan, D. C. Mass., 129 F. Supp. 331 (1955).

requirement of written notice from the supplier a condition precedent to a right of action on the bond; and no rule of liberality in construction can justify reading out of the statute the very condition which Congress laid down as prerequisite to the cause of action.[10]

It cannot be doubted that one purpose of Congress in enacting the Miller Act was the protection of laborers and materialmen. But it is clear too, we think, from the mechanics provided in the Act for its operation and the accomplishment of its purpose, that it was the intent of Congress to fix a time limit after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor. It is not consistent with either this intent or the mechanics of the statute if a prime contractor is required to choose between withholding payment to his subcontractor indefinitely or acting on peril of learning thereafter that some writing, by some person, located somewhere in his files, contains sufficient information regarding accounts between a supplier and the subcontractor to render him liable for the subcontractor's bill. A brief

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[10]Cf. Clifford F. MacEvoy Co. v. United States for Use and Benefit of Calvin Tomkins Co., 322 U. S. 102, 107, 88 L. Ed. 1163, 1167, 64 S. Ct. 890 (1944). We are aware that Houston Fire and Casualty Insurance Co. v. United States for Use and Benefit of Trane Company, 5 Cir., 217 F. 2d 727 (1954) is *contra*, but we do not consider the case soundly decided and, accordingly, do not follow it. The court in its opinion in that case expressed misgivings about holding the supplier entitled to recover on the bond although he had given no written notice to the prime contractor, but cited Coffee v. United States for Use and Benefit of Gordon, *supra*, footnote 9, as requiring such holding. Oddly, *Coffee* did not hold that written notice to the prime contractor was unnecessary, but, in fact, pointed out, p. 969, that no case up to that time had so held.

letter from the supplier to the prime contractor will make certain and unambiguous the rights and liabilities of all concerned—the supplier, the prime contractor, and the surety. We do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond.[11]

Appellee says in his brief that even though it be found that no sufficient notice under the statute was given, the judgment below must be upheld because there was a direct contractual relationship between Malloy and the prime contractor, which the district court should have found and which rendered notice unnecessary. However, no effort is made by the appellee in his brief to point out the evidence in the record which required the district court to find such contractual relationship. We have ourselves examined the entire record and find no error in the district court's conclusion that Malloy had no contractual relationship, express or implied, with the prime contractor.

Appellee contends, further, that the giving of the statutory notice is necessary only as a condition to a right of action against the surety; that the provisions of the contract with the United States and the provisions of the payment bond both make the prime contractor liable to Hickey's suppliers without any notice; and that, conse-

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[11]"One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. 'Equity aids the vigilant.'" H. Rep. No. 1263 (74th Cong., 1st Sess.)

quently, the judgment below must be upheld as against the prime contractor. Insofar as these contentions are based upon the provisions of the contract, they have no merit. Sternberg Co., Inc. v. State National Bank of Texarkana, 5 Cir., 69 F. 2d 759, 760 (1934); Gallaher & Speck, Inc. v. Ford Motor Company, 7 Cir., 226 F. 2d 728, 731 (1955); United States for Use of Birmingham Slag Co. v. Perry, 5 Cir., 115 F. 2d 724, 725 (1940). And insofar as appellee relies upon the provisions of the bond, the contentions are likewise without merit. The statute providing the cause of action on the bond, 40 U. S. C. A. §270b(a), makes no distinction between the liability of the contractor and that of his surety. Recovery can be had against neither unless the condition precedent to the existence of the right of action—the giving of the statutory notice—has been complied with.

Malloy contended below that, as an unpaid supplier of labor and material which was incorporated into the work done under the contract with the United States, an equitable lien existed in his favor upon the funds in the hands of the prime contractor which had been paid by the United States in settlement of the "subsidence" claim. The district judge in the course of the trial ruled adversely to Malloy on this proposition and, in the cross-appeal, this ruling is claimed to be erroneous. We hold that the ruling of the district judge was correct. The Bank of Arizona v. National Surety Corporation, 9 Cir., 237 F. 2d 90 (1956); *In re* Flotation Systems, Inc., 65 F. Supp. 698 (1946).

The judgment is reversed and the cause remanded to the district court with directions to enter judgment that appellee take nothing by the complaint, with costs to appellants.

(Endorsed:) Opinion. Filed Dec. 31, 1956.
Paul P. O'Brien, Clerk.

It Is Ordered that the motion of appellee to dismiss the appeals of all appellants herein is denied.

Dated December 31, 1956.

/s/ James Alger Fee
Circuit Judge

/s/ Richard H. Chambers
Circuit Judge

/s/ James A. Walsh
District Judge

(Endorsed:) Order. Filed December 31, 1956.
Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.
No. 14,658

Leslie S. Bowden, etc., *et al.*, Appellants, vs. United States of America for the use of Emmett J. Malloy, Appellee.

United States of America for the use of Emmett J. Malloy, Cross-Appellant, vs. Leslie S. Bowden, etc., *et al.*, Cross-Appellee.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of Appellants Bowden, *et al.*, and against Appellee Emmett J. Malloy, and that this cause be, and hereby is remanded to the said District Court with directions to enter judgment that appellee take nothing by the complaint, with costs to appellants.

It Is Further Ordered and adjudged by this Court that Appellants Bowden, *et al.*, recover against Appellee Emmett J. Malloy, for their costs herein expended and have execution therefor.

(Endorsed) Judgment Filed and Entered: December 31, 1956.

PAUL P. O'BRIEN, Clerk.